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INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

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Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law

1. Text of the draft articles provisionally adopted by the Commission so far on first reading

1. The text of the draft articles provisionally adopted so far by the Commission are reproduced below.

[CHAPTER I. GENERAL PROVISIONS]*

Article 1

Scope of the present articles

The present articles apply to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which involve a risk of causing significant transboundary harm through their physical consequences.

Article 2

Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(c) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out.

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* Designation of the chapter is provisional. For commentaries to draft articles 1, 2 (paras. (a), (b) and (c)), 11 to 14 bis [20 bis], 15 to 16 bis and 17 to 20, see General Assembly Official Records, forty-ninth session, Supp. No. 10, (A/49/10) pp. 388-437.

[CHAPTER II. PREVENTION]*

Article 11**

Prior authorization

States shall ensure that activities referred to in article 1 are not carried out in their territory or otherwise under their jurisdiction or control without their prior authorization. Such authorization shall also be required in case a major change is planned which may transform an activity into one referred to in article 1.

Article 12

Risk assessment

Before taking a decision to authorize an activity referred to in article 1, a State shall ensure that an assessment is undertaken of the risk of such activity. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as in the environment of other States.

Article 13

Pre-existing activities

If a State, having assumed the obligations contained in these articles, ascertains that an activity involving a risk of causing significant transboundary harm is already being carried out in its territory or otherwise under its jurisdiction or control without the authorization as required by article 11, it shall direct those responsible for carrying out the activity that they must obtain the necessary authorization. Pending authorization, the State may permit the continuation of the activity in question at its own risk.

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* Designation of the chapter is provisional. For commentaries to draft articles 1, 2 (paras. (a), (b) and (c)), 11 to 14 bis [20 bis], 15 to 16 bis and 17 to 20, see General Assembly Official Records, forty-ninth session, Supp. No. 10, (A/49/10) pp. 388-437.

** The present numbering is provisional and follows that proposed by the Special Rapporteur in his reports.

Article 14*

Measures to prevent or minimize the risk

States shall take legislative, administrative or other actions to ensure that all appropriate measures are adopted to prevent or minimize the risk of transboundary harm of activities referred to in article 1.

Article 14 bis [20 bis]

Non-transference of risk

In taking measures to prevent or minimize a risk of causing significant transboundary harm, States shall ensure that the risk is not simply transferred, directly or indirectly, from one area to another or transformed from one type of risk into another.

Article 15

Notification and information

1. If the assessment referred to in article 12 indicates a risk of causing significant transboundary harm, the State of origin shall notify without delay the States likely to be affected and shall transmit to them the available technical and other relevant information on which the assessment is based and an indication of a reasonable time within which a response is required.

2. Where it subsequently comes to the knowledge of the State of origin that there are other States likely to be affected, it shall notify them without delay.

Article 16

Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all information relevant to preventing or minimizing the risk of causing significant transboundary harm.

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* The expression "prevent or minimize the risk" of transboundary harm in this and other articles will be reconsidered in the light of the decision by the Commission as to whether the concept of prevention includes, in addition to measures aimed at preventing or minimizing the risk of occurrence of an accident, measures taken after the occurrence of an accident to prevent or minimize the harm caused.

Article 16 bis

Information to the public

States shall, whenever possible and by such means as are appropriate, provide their own public likely to be affected by an activity referred to in article 1 with information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Article 17

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Article 18

Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them and without delay, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of causing significant transboundary harm, and cooperate in the implementation of these measures.

2. States shall seek solutions based on an equitable balance of interests in the light of article 20.

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution the State of origin shall nevertheless take into account the interests of States likely to be affected and may proceed with the activity at its own risk, without prejudice to the right of any State withholding its agreement to pursue such rights as it may have under these articles or otherwise.

Article 19

Rights of the State likely to be affected

1. When no notification has been given of an activity conducted in the territory or otherwise under the jurisdiction or control of a State, any other State which has serious reason to believe that the activity has created a risk of causing it significant harm may require consultations under article 18.

2. The State requiring consultations shall provide technical assessment setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1, the State requiring consultations may claim an equitable share of the cost of the assessment from the State of origin.

Article 20

Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 18, the States concerned shall take into account all relevant factors and circumstances, including:

(a) the degree of risk of significant transboundary harm and the availability of means of preventing or minimizing such risk or of repairing the harm;

(b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) the risk of significant harm to the environment and the availability of means of preventing or minimizing such risk or restoring the environment;

(d) the economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(e) the degree to which the States likely to be affected are prepared to contribute to the costs of prevention;

(f) the standards of protection which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

Article A [6]*

Freedom of action and the limits thereto

The freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited. It is subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm, as well as any specific legal obligations owed to other States in that regard.

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* Articles A, B, C and D deal with general principles. The placement of these articles will be determined once all the articles on the topic have been adopted on first reading.

Article B [8 and 9]

Prevention

States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm.

Article C [9 and 10]

Liability and reparation*

In accordance with the present articles, liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to reparation.

Article D [7]

Cooperation

States concerned shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing or minimizing the risk of significant transboundary harm and, if such harm has occurred, in minimizing its effects both in affected States and in States of origin.

2. Text of draft articles A [6], B [8 and 9] C [9 and 10] D [7] with commentaries thereto provisionally adopted by the Commission at its forty-seventh session

2. The text of draft articles A [6], B [8 and 9], C [9 and 10] and D [7] with commentaries thereto provisionally adopted by the Commission at its forty-sixth session and produced below.

Article A [6]

Freedom of action and the limits thereto

The freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited. It is subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm, as well as any specific obligations owed to other States in that regard.

Commentary

(1) This article sets forth the principle that constitutes the basis for the entire topic. It is inspired by Principle 21 of the Declaration of the

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* As is clear from the phrase "in accordance with the present articles" the substantive content of this article is left to later elaboration of the articles on liability. At this stage the article is a working hypothesis of the Commission.

United Nations Conference on the Human Environment 1/ and Principle 2 of the Rio Declaration on Environment and Development. 2/ Both principles affirm the sovereign right of States to exploit their own resources, in accordance with the Charter of the United Nations and the principles of international law.

(2) The adopted drafting generalizes Principle 21, since Article A is not limited only to activities directed to the exploitation of resources, but encompasses within its meaning all activities developed in the territory or otherwise under the jurisdiction or control of a State. On the other hand, the limitations referring to the freedom of a State to carry on or authorize such activities are made more specific than in Principle 21, since such

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1/ Principle 21 of the Declaration of the United Nations Conference on the Human Environment reads as follows:

> "States have, in accordance with the Charter of the United Nations and the principles of the international law, the sovereign right to exploit their own natural resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), chap. I.

2/ Principle 2 of the Rio Declaration on Environment and Development reads as follow:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, document A/CONF.151/26/Rev.1 (vol. I).

limitations are constituted by the general obligation that a State has to prevent or minimize the risk of causing significant transboundary harm as well as the specific State obligations owed to other States in that regard. 3/

(3) The activities to which this article applies are defined in article 1. The present article speaks of risk of causing significant transboundary harm, while the other two Principles - Principle 21 of Stockholm and Principle 2 of the Rio Declarations - speak of causing transboundary damage. In practical terms, however, prevention or minimization of risk of causing harm is the first step in preventing the harm itself.

(4) In that sense, the principle expressed in this article goes further in the protection of the affected States rights and interests and is specifically applicable to hazardous activities, that is, activities which involve a risk of causing transboundary harm.

(5) The general obligation to prevent transboundary harm is well established in international law 4/, but article A recognizes a general obligation on the State of origin to prevent or minimize the risk of causing transboundary harm, which means that the State must ensure that the operator of an activity within the scope of articles 1 and 2 takes all adequate precautions so that transboundary harm will not take place, or if the activity is one of those which do not admit of a total elimination of the risk, whatever the precautions taken, then the State of origin must take all necessary steps, including consultation with the presumably affected State or States, to make the operator take such measures as are adequate to minimize the risk.

(6) In general agreement with the previous paragraph, is Article 10 of the Legal Principles for Environmental Protection and Sustainable Development, which was drafted by the Experts Group of Environmental Law of the World Commission on Environment and Development:

3/ The Commission may, at some point, add further limitations to article 1 in the form of a list of activities or a list of substances manipulated by such activities.

4/ This general obligation of the States has its foundation in international practice. The General Commentary, General Assembly Official Records, forty-ninth session Supp. No. 10 (A/49/10), pp. 389-390. See also Commentary to article 1 (ibid., pp.391/396).

"States shall, without prejudice to the principles laid down in Articles 11 and 12, prevent or abate any transboundary environmental interference or a significant risk thereof which causes substantial harm - i.e. harm which is not minor or insignificant." 5/

(7) The principle is thus referred to in the commentary:

"Subject to certain qualifications to be dealt with below, Article 10 lays down the well-established basic principle governing transboundary environmental interferences which causes, or entails a significant risk of causing, substantial harm in an area under national jurisdiction of another State or in an area beyond the limits of national jurisdiction". 6/

(8) It is considered in this work that this principle is an implicit consequence of the duty not to cause transboundary harm:

"It should be noted that the principle formulated above does not merely state that States are obliged to prevent or abate transboundary environmental interferences which *actually* cause substantial harm, but also that they are obliged to prevent or abate activities which entail a *significant risk* of causing such harm abroad. The second statement states as a matter of fact *explicitly* what must already be deemed to be *implicit* in the duty to prevent transboundary environmental interferences *actually* causing substantial harm and serves to exclude any misunderstanding on this point." 7/

(9) In practical terms, then, prevention or minimization of risk of causing harm, is the first step in preventing the harm itself. Making explicit what

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5/ *Environmental Protection and Sustainable Development, Legal Principles and Recommendations*, adopted by the Experts Group on Environmental Law of the World Commission on Environment and Development. (London, Dordrecht and Boston, Graham and Trotham, Nijhoff), p.75.

6/ Id.p.75.

7/ Id. p.78. However, "while activities creating a significant risk of causing substantial harm must in principle be prevented or abated, it may well be that, in the case of certain dangerous activities, the unlawfulness will be taken away when all possible precautionary measures have been taken to preclude the materialization of the risk *and the benefits created by the activity must be deemed to far outweigh the benefits to be obtained by eliminating the risk* which would require putting an end to the activity itself." (p.79)

is implicit in the above mentioned general obligation of prevention is already an important advance in the law referring to transboundary harm, since it gives clear foundation to all other obligations of prevention, and particularly to those of notification, exchange of information and consultation, which originate in the right of the presumably affected State - corresponding to this general obligation of prevention - to participate in the general process of prevention.

(10) The article has two parts. The first part affirms the freedom of action by States and the second part addresses the limitations to that freedom. The first part provides that the freedom of States to conduct or permit activities in their territory or under their jurisdiction or control is not unlimited. This is another way of stating that the freedom of States in such matters is limited. The Commission however, felt that it would be more appropriate to state the principle in a positive form, which presupposes the freedom of action of States, rather than in a negative form which would have emphasized on the limitation of such freedom.

(11) The second part of the article enumerates two limitations to such State freedom. First, such freedom must be subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm. Second, such freedom must be subject to any specific obligations owed to other States in that regard. The words "in that regard" refer to preventing or minimizing the risk of causing significant transboundary harm.

(12) The first limitation to the freedom of States to carry on or permit activities referred to in article 1 is set by the general obligation of States to prevent or minimize the risk of causing significant transboundary harm. The general obligation stipulated under this article should be understood as establishing an obligation of conduct. The article does not require that a State guarantee the absence of any transboundary harm, but that it takes all the measures required to prevent or minimize such harm. This understanding is also consistent with the specific obligations stipulated in various articles on prevention.

(13) The meaning and the scope of the obligation of due diligence have been explained in paragraphs 5-10 of the commentary to article B [8 and 9].

Article B [8 and 9]

Prevention

States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm.

Commentary

(1) This article, together with article D [7] on "cooperation" provides the theoretical foundation for the articles on prevention that the Commission adopted last year. The articles set out specific and detailed obligations of States to prevent or minimize significant transboundary harm. The article is short and concise. It provides that States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm. The word "measures" refers to all those specific actions and steps that are specified in the articles, which have already been adopted, on prevention and minimization of transboundary harm.

(2) This article incorporates a number of elements contained in article 14, "Measures to prevent or minimize risk" which was already adopted last year. 8/ At the appropriate time, article 14 will be brought into harmony with the present article and will deal exclusively with implementation, following, for example, the model in the Convention on Environmental Impact Assessment in a Transboundary Context. A new article 14 could read:

> "States shall take all legislative, administrative or other action to implement the provisions of these articles (on prevention, etc.)."

(3) Article B, then, sets up the principle of prevention that concerns every State regarding activities of article 1. Article 14 specifies the *modalities* whereby the State of origin may discharge the obligations of prevention which have been established in pursuance of the present principle, i.e. by legislative, administrative or other action such as generally enforcing the laws, administrative decisions and policies which the State has approved in its concern of preventing or minimizing the risk of transboundary harm. The

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8/ Paragraphs (1) to (9) of the commentary to this article are taken from article 14. When article 14 is redrafted appropriate adjustments will be made.

practical measures of precaution, such as putting filters in chimneys or including - or not including - certain elements in processes of production, concern operators of activities of article 1.

(4) The obligation of States to take preventive or minimization measures is one of due diligence, requiring States to take certain unilateral measures to prevent or minimize a risk of significant transboundary harm. The obligation imposed by this article is not an obligation of result. It is the conduct of a State that will determine whether the State has complied with its obligation under the present articles.

(5) An obligation of due diligence as the standard basis for the protection of the environment from harm, can be deduced from a number of international conventions 9/ as well as from the resolutions and reports of international conferences and organizations. 10/ The obligation of due diligence was recently discussed in a dispute between Germany and Switzerland relating to the pollution of the Rhine by Sandoz; the Swiss Government acknowledged responsibility for lack of due diligence in preventing the accident through adequate regulation of its pharmaceutical industries. 11/

(6) In the Alabama case (United States v. United Kingdom), the Tribunal examined two different definitions of due diligence submitted by the parties. The United States defined due diligence as:

9/ See for example, art. 194, para. 1, of the United Nations Convention on the Law of the Sea, A/CONF.62/122; arts. I, II, and VII (2) of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter in International Legal Materials, vol. 11, p. 1294; art. 2 of the Vienna Convention for the Protection of the Ozone Layer; ibid, vol. 26, p. 1529; art. 7, para. 5, of the Convention on the Regulation of Antarctic Mineral Resources Activities, International Legal Materials, vol. 28, p. 868; art. 2, para. 1, of the Convention on Environmental Impact Assessment in a Transboundary Context, doc. E/ECE/1250; and art. 2, para. 1, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, International Legal Materials, vol. 31, p. 1313.

10/ See Principle 21 of the World Charter for Nature, General Assembly resolution 37/7 adopted on 28 October 1982; Principle VI of Draft Principles relating to weather modification prepared by the WHO and by UNEP, in Digest of United States Practice in International Law, 1978, p. 1205.

11/ See New York Times, 11 November 1986, p. A 1; 12 November 1986, p. A 8; 13 November 1986, p. A 3. See also Alexander Kiss, "Tchernobale" ou la pollution accidentelle du Rhin par les produits chimiques, in Annuaire Français de Droit International, vol. 33, 1987, pp. 719-727.

> "[A] diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it; a diligence which shall, by the use of active vigilance, and of all the other means in the power of the neutral, through all stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will, ..." 12/

(7) The United Kingdom defined due diligence as "such care as Governments ordinarily employ in their domestic concerns". 13/ The Tribunal seemed to have been persuaded by the broader definition of the standard of due diligence presented by the United States and expressed concern about the "national standard" of due diligence presented by the United Kingdom. The Tribunal stated that "[t]he British Case seemed also to narrow the international duties of a Government to the exercise of the restraining powers conferred upon it by municipal law, and to overlook the obligation of the neutral to amend its laws when they were insufficient". 14/

(8) The extent and the standard of the obligation of due diligence was also elaborated on by Lord Atkin in the case of Donoghue v. Stevenson as follows:

> "The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, 'who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called into question." 15/

12/ The Geneva Arbitration (The Alabama case) in J. B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party, vol. I, 1898, pp. 572-73.

13/ Ibid., p. 612.

14/ Ibid.

15/ [1932] A.C., p. 580 (H.L.(Sc)).

(9) In the context of the present articles, due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them. Thus States are under an obligation to take unilateral measures to prevent or minimize the risk of significant transboundary harm by activities within the scope of article 1. Such measures include, first, formulating policies designed to prevent or minimize transboundary harm and, second, implementing those policies. Such policies are expressed in legislation and administrative regulations and implemented through various enforcement mechanisms.

(10) The Commission believes that the standard of due diligence against which the conduct of a State should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. For example, activities which may be considered ultra-hazardous require a much higher standard of care in designing policies and a much higher degree of vigour on the part of the State to enforce them. Issues such as the size of the operation; its location; special climate conditions; materials used in the activity; and whether the conclusions drawn from the application of these factors in a specific case are reasonable are among the factors to be considered in determining the due diligence requirement in each instance. The Commission also believes that what would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time may not be considered as such at some point in the future. Hence, due diligence requires a State to keep abreast of technological changes and scientific developments and to determine not only that equipment for a particular activity is working properly, but also that it meets the most current specifications and standards.

(11) The Commission takes note of Principle 11 of the Rio Declaration on Environment and Development which states:

> "States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards

applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries." 16/

(12) Similar language is found in Principle 23 of the Stockholm Declaration. That Principle, however, specifies that such domestic standards are "[w]ithout prejudice to such criteria as may be agreed upon by the international community". 17/ It is the view of the Commission that the economic level of States is one of the factors to be taken into account in determining whether an appropriate standard of due diligence has been exercised by a State. But a State's economic level cannot be used to discharge a State from its obligation under this article.

(13) The obligation of the State is, first, to attempt to design policies and to implement them with the aim of preventing significant transboundary harm. If that is not possible, then the obligation is to attempt to minimize such harm. In the view of the Commission, the word "minimize" should be understood in this context to mean reducing to the lowest point the possibility of harm.

Article C [9 and 10]

Liability and reparation*

In accordance with the present articles, liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to reparation.

Commentary

(1) This article forms the basis for the future articles addressing issues of liability and reparation. It has been adopted as a working hypothesis due to the circumstance that the chapter of the draft articles which is devoted to liability has not yet been adopted by the Commission. Notwithstanding that circumstance, it was decided that at this point the Commission should

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16/ Doc. A/CONF.151/26/Rev.1 (vol. I), p. 3.

17/ Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, doc. A/CONF.48/Rev.1.

* As is clear from the phrase "in accordance with the present articles" the substantive content of this article is left to later elaboration of the articles on liability. At this stage the article is a working hypothesis of the Commission.

anticipate a very general principle as such a working hypothesis for the next stage in the development of the topic, namely that of remedial measures which will be applied in case of significant transboundary harm.

(2) The principle contained in article C is not altogether new to the Commission. At its fortieth session, in 1988, the Commission stated the following:

> "There was general agreement that the principles identified by the Special Rapporteur in paragraph 86 of his Fourth Report were relevant to the topic and were acceptable in their general outline. Those principles were as follows: (1) The draft articles must ensure each State as much freedom of choice within its territory as is compatible with the rights and interests of other States. (2) The protection of such rights and interests require the adoption of measures of prevention and if injury nevertheless occurs, measures of reparation. (3) In so far as may be consistent with those two principles, the innocent victim should not be left to bear his loss or injury)." 18/

(3) The obligation set forth in the article must, then, be understood in the context of whatever articles the Commission will adopt on liability in the future. The words "in accordance with the present articles" are intended to convey the understanding that the principles of liability and of reparation are subject to the terms and conditions set forth in the present and future articles on the topic.

(4) The principle of liability and reparation is a necessary corollary and a complement to article A, in regard to the freedom of States to carry out or permit activities referred to in article 1 in their territory or otherwise under their jurisdiction or control. As was seen, that principle establishes the conditions on prevention or minimization of the risk, under which the activities that give rise to it are to be considered not prohibited by international law. Article C, on the other hand, determines the other condition: the obligation to make reparation, pursuant to the specific articles on liability which the Commission will establish, whenever significant transboundary damage arises. A regime which permits the conduct of activities hazardous to other States without any form of reparation when damage arises is not conceivable.

18/ Yearbook ... 1988, vol. II, (Part Two), doc. A/43/10, para. 82. Emphasis added.

(5) Since the Commission has not yet agreed on a specific regime of liability, the article on the principle of liability is without prejudice to the question of (a) the party that is liable and must make reparation; (b) the forms and the extent of reparation; (c) the harm that is subject to reparation; and (d) the basis of liability. This explains the marked difference in the structure of this article and those of articles A [6], B [8 and 9] and D [7]. Unlike those provisions, which identify outright who bears the obligation, this article only establishes - as a working hypothesis - that there is liability and an obligation to make reparation.

(6) As regards the basis of liability, it can only be advanced that such basis is not perforce the violation of an international obligation. The Commission, when addressing the whole framework of liability and its specific articles, will take note of a variety of possibilities. For example, whether liability should be based on a causal relationship or on the breach of the obligation of due diligence or whether both of these bases could be used depending upon the party or parties to which liability is attributable.

(7) In fact, in international practice there are several ways of remedying the transboundary damage caused by a hazardous activity to persons or property, or the environment. One is the absolute liability of the State, as in the Convention on International Liability for Damage Caused by Space Objects of 29 March 1992 19/, the only case of State absolute liability. Another way is to channel liability on to the operator, and leaving the State out of the picture, as in the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of 9 March 1993. 20/ Still another is to assign to the State some subsidiary liability for that amount of compensation not satisfied by the operator, such as the Convention for the Third Party Liablility in the Field of Nuclear Energy of 29 July 1960 21/ and the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963. 22/

19/ United Nations, Treaty Series (UNTS), vol. 961, p. 187.

20/ ETS, No. 150

21/ UNTS, vol. 956, p. 251.

22/ Ibid., vol. 1063, p. 265.

(8) The way in which the principle has been drafted does not pre-empt any possibility regarding the future work of the Commission, nor rules out any form of liability from being embraced. Indeed, a type of alternative may be considerd suitable which would make the State responsible only in cases where due diligence is breached, in a way similar to that of article 7 of the articles on the Law of the Non-navigational Uses of International Watercourses.

(9) In including this article within the set of fundamental principles of the topic, the Commission takes careful note of Principle 22 of the Stockholm Declaration and Principle 13 of the Rio Declaration in which States are encouraged to cooperate in developing further international law regarding liability and compensation for environmental damage caused by activities within their jurisdiction or control to areas beyond their national jurisdiction. These Principles demonstrate aspirations and preferences of the international community.

(10) It must be noted that in the English version, "reparation" is used instead of "compensation", which is the word usually associated with "liability". The Commission found, however, that the concept of compensation in the meaning of article 8 of the draft articles on State responsibility, i.e. as the payment of a sum of money, is hardly applicable to some instances of remedying environmental harm, where restoration is the best solution. Restoration, being an attempt of returning to the status quo ante, may be considered as a form of restitutio naturalis and certainly not of compensation. Also in the field of environmental harm, the introduction into a damaged ecosystem, by way or reparation, of certain equivalent components to those diminished or destroyed is not a monetary compensation, although it may be considered a form of compensation by equivalent. Such solution is envisaged in certain instruments. 23/ "Reparation", then, must be understood in its most general meaning, as including some of the categories of consequences that the same term has in article 6 bis, Part Two, of the State Responsibility draft.

(11) The Commission examined the treaty practice by which States have either identified a particular activity or substances with injurious transboundary consequences and established a liability regime for the transboundary harm.

23/ See for example, Article 2 (8) of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, op. cit.

Activities involving oil transportation, oil pollution and nuclear energy or material are prime targets of these treaties. 24/ Some conventions address the question of liability resulting from activities other than those involving oil or nuclear energy or material. 25/ Many other treaties refer to the issue of liability without any further clarification as to the substantive or procedural rules of liability. These treaties, while recognizing the relevance of the liability principle to the operation of the treaty, do not resolve the issue. They seem to rely on the existence in international law of liability rules, or to expect that such rules will be

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24/ See in particular the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969, IMOC, Official Records of the International Legal Conference on Marine Pollution Damage, London, 1969; the 1984 Protocol to the 1969 Convention, IMO, International Conference on Liability and Compensation for Damage in Connection with the Carriage of Certain Substances by Sea, LEG/CONF.6/66 of 25 May 1984; Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources of 17 December 1976, UNEP, Selected Multilateral treaties in the Field of the Environment, p. 474; Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, United Nations, Treaty Series (UNTS), vol. 956, p. 251; Convention on the Liability or the Operators of Nuclear Ships, of 25 May 1962, IAEA, International Conventions relating to Civil Liability for Nuclear Damage, Legal Series No. 4, rev. ed. (Vienna, 1976), p. 34; Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963, UNTS, vol. 1063, p. 265; Convention relating to Civil Liability in the Field of Carriage of Nuclear Material of 17 December 1971, ibid., vol. 974, p. 255; and the Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) of 10 December 1989, Revue de droit uniform (UNIDROIT), 1989, p. 280.

25/ See the Convention on International Liability for Damage Caused by Space Objects of 1972 op. cit., and the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment of 9 March 1993, op. cit.

developed. 26/ Yet other treaties indicate that another instrument will be developed by the parties addressing the question of liability which might arise under the treaties. 27/

(12) The concept of liability has also been developed to a limited extent in State practice. For example, in the Trail Smelter case, the smelter company was permitted to continue its activities, but the Tribunal established a permanent regime which called, under certain conditions, for compensation for injury to the United States interests arising from fume emission even if the smelting activities conformed fully to the permanent regime as defined in the decision:

> "The Tribunal is of the opinion that the prescribed regime will probably remove the causes of the present controversy and, as said before, will probably result in preventing any damage of a material nature occurring in the State of Washington in the future. But since the desirable and expected result of the regime or measures of control hereby required to be adopted and maintained by the Smelter may not occur, and since in its answer to Question No. 2, the Tribunal has required the Smelter to refrain from causing

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26/ See in the this context the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment for Pollution of 24 April, 1978, UNTS, vol. 1140, p. 133; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 29 December 1972, UNTS, vol., p. 120; Convention for the Protection of the Mediterranean Sea against Pollution of 16 February 1976, UNEP, Selected Multilateral Treaties in the Field of the Environment, p. 448; Convention on the Protection of the Marine Environment of the Baltic Sea Area of 9 April 1992, [IMO 1] LDC.2/Circ. 303; Convention on the Protection of the Black Sea Against Pollution, of 21 April 1992, ibid., Circ. 302; Convention on the Transboundary Effects of Industrial Accidents of 17 March 1992, Int'l L. Mat., vol. 31, p. 1330; and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 17 March 1992, ibid, vol. 31, p. 1312.

27/ See for example, the Convention on the Regulation of Antarctic Mineral Resource Activities of 2 June 1988, makes the development of liability rules a precondition for the exploration and exploitation of mineral resources of Antarctica. For the Convention see, Int'l L. Mat., vol. 28, p. 868. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989 provides in article 12 that State Parties shall develop a protocol on liability and compensation. For the Convention see, Int'l Law Man. vol. 28, p. 657. See also Bamako Convention on the ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa of 29 January 1991 which also provides that States Parties to the Convention shall develop a protocol on liability and compensation. For the Convention see, ibid., vol. 30, 1991, p. 773.

damage in the State of Washington in the future, as set forth therein, the Tribunal answers to Question No. 2...: (a) if any damage as defined under Question No. 2 shall have occurred since October 1, 1940, or shall occur in the future, whether through failure on the part of Smelter to comply with the regulations herein prescribed or notwithstanding the maintenances of the regime, an indemnity shall be paid for such damage but only when and if the two Governments shall make arrangements for the disposition of claims for indemnity ... " 28/ (Emphasis added)

(13) It is important to note that the requirement of payment of compensation by the Tribunal was not on the basis of negligence or fault.

(14) In the Lake Lanoux case, on the other hand, the Tribunal, responding to Spain's allegation that the French projects would entail an abnormal risk to Spanish interests, stated as a general matter that responsibility would not arise as long as all possible precautions against the occurrence of an injurious event had been taken. 29/ The Tribunal made a brief reference to the question of dangerous activities, by stating: "It has not been clearly affirmed that the proposed works [by France] would entail an abnormal risk in neighbourly relations or in the utilization of the waters." This passage may be interpreted as meaning that the Tribunal was of the opinion that abnormally

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28/ United Nations, Reports of International Arbitral Awards, vol. III, pp. 1980-1981. Emphasis added.

29/ The Tribunal stated:

"The question was lightly touched upon in the Spanish counter memorial, which underlined the 'extraordinary complexity' of procedures for control, their 'very onerous' character, and the 'risk of damage or of negligence in the handling of the watergates, and of obstruction in the tunnel. But it has never been alleged that the works envisaged present any other character or would entail any other risks than other works of the same kind which today are found all over the world. It has not been clearly affirmed that the proposed works would entail an abnormal risk in neighbourly relations or in the utilization of the waters. As we have seen above, the technical guarantees for the restitution of the waters are as satisfactory as possible. If, despite the precautions that have been taken, the restitution of the waters were to suffer from an accident, such an accident would be only occasional and, according to the two Parties, would not constitute a violation of article 9."

International Law Reports (1957), pp. 123-124, para. 6 of the award.

dangerous activities (as opposed to those originating risks which may be controlled) constituted a special problem, and that, if Spain had established that the proposed French project would entail an abnormal risk of transboundary harm to Spain, the decision of the tribunal might have been different.

(15) In the Nuclear Tests Case, the International Court of Justice, in making the Order of 22 June 1973, duly recited Australia's statement of its concerns that "the atmospheric nuclear explosions carried out by France in the Pacific had caused widespread radioactive fallout on Australian territory and elsewhere in the southern hemisphere, had given rise to measurable concentrations of radio-nuclides in foodstuffs and in man, and have resulted in additional radiation doses to persons living in that hemisphere and in Australia in particular; that any radioactive material deposited on Australian territory could be potentially dangerous to Australia and its people and any injury caused thereby would be irreparable; that the conduct of French nuclear tests in the atmosphere created anxiety and concern among the Australian people; that any effects of the French nuclear tests upon the resources of the sea or the conditions of the environment could never be undone and would be irremediable by any payment of damages; and any infringement by France of the rights of Australia and her people to freedom of movement over the high seas and superjacent airspace could not be undone;". 30/

(16) In his dissenting opinion, Judge Ignacio-Pinto, while expressing the view that the Court lacked jurisdiction to deal with the case, stated that:

> "if the Court were to adopt the contention of the Australian request it would be near to enforcing a novel conception in international law whereby States would be forbidden to engage in any risk-producing activity within the area of their own territorial sovereignty; but that would amount to granting any State the right to intervene preventively in the national affairs of other States." 31/

(17) He further stated that "[i]n the present state of international law, the 'apprehension' of a State, or 'anxiety', 'the risk of atomic radiation', do

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30/ Nuclear Tests Case (Australia v. France), (Order of 22 June 1973), 1973 I.C.J. Reports, p. 104. The Court did not rule on merits of the case.

31/ Ibid., p. 132.

not in my view suffice to substantiate some higher law imposed on all States and limiting their sovereignty as regards atmospheric nuclear tests." 32/ In his view, "[t]hose who hold the opposite view may perhaps represent the figure-heads or vanguard of a system of gradual development of international law, but it is not admissible to take their wishes into account in order to modify the present state of law." 33/

(18) The Commission also takes note of a number of incidents in which, without admitting any liability, compensation was paid to the victims of significant transboundary harm. In this context, reference should be made to the following.

(19) The series of United States nuclear tests on Eniwetok Atoll on 1 March 1954 caused injuries extending far beyond the danger area. They injured Japanese fishermen on the high seas and contaminated a great part of the atmosphere and a considerable quantity of fish, thus seriously disrupting the Japanese fish market. Japan demanded compensation. In a note dated 4 January 1955, the United States Government, completely avoiding any reference to legal liability, agreed to pay compensation for harm caused by the tests. 34/

(20) In the case of the injuries sustained in 1954 by the inhabitants of the Marshall Islands, then a Trust Territory administered by the United States,

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32/ Ibid.

33/ Ibid.

34/ The United States Government stated that:

> "... The Government of the United States of America has made clear that it is prepared to make monetary compensation as an additional expression of its concern and regret over the injuries sustained ... ... the United States of America hereby tenders, ex gratia, to the Government of Japan, without reference to the question of liability, the sum of two million dollars for purposes of compensation for the injuries or damages sustained as a result of nuclear tests in the Marshall Islands, in 1954 ...
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> It is the understanding of the Government of the United States of America that the Government of Japan, in accepting the tendered sum of two million dollars, does so in full settlement of any and all claims against the United States of America or its agents, national or juridical entities for any and all injuries, losses or damage arising out of the said nuclear tests."

See The Department of State Bulletin, Washington, D.C., vol. 32, No. 812, 17 January 1955, pp. 90-91.

the latter agreed to pay compensation. A report of the Committee on Interior and Insular Affairs of the United States Senate stated that, owing to an unexpected wind shift immediately following the nuclear explosion, the 82 inhabitants of the Rongelap Atoll had been exposed to heavy radioactive fallout. After describing the injuries to persons and property suffered by the inhabitants and the immediate and extensive medical assistance provided by the United States, the report concluded: "It cannot be said, however, that the compensatory measures heretofore taken are fully adequate ...". The report disclosed that in February, 1960, a complaint against the United States had been lodged with the high court of the Trust Territory with a view to obtaining $8,500,000 as compensation for property damage, radiation sickness, burns, physical and mental agony, loss of consortium and medical expenses. The suit had been dismissed for lack of jurisdiction. The report indicated, however, that bill No. 1988 (on payment of compensation) presented in the House of Representatives was "needed to permit the United States to do justice to these people". On 22 August 1964, President Johnson signed into law an act under which the United States assumed "compassionate responsibility" to compensate inhabitants of the Rongelap Atoll, in the Trust Territory of the Pacific Islands, for radiation exposures sustained by them as a result of a thermonuclear detonation at Bikini Atoll in the Marshall Islands on March 1, 1954" and authorized $950,000 to be paid in equal amounts to the affected inhabitants of Rongelap. 35/ According to another report, in June 1982 the Reagan Administration was prepared to pay $100 million to the Government of the Marshall Islands in settlement of all claims against the United States by islanders whose health and property had been affected by United States nuclear weapons tests in the Pacific between 1946 and 1963. 36/

(21) In 1948, a munitions factory in Arcisate, in Italy, near the Swiss frontier, exploded and caused varying degrees of damage in several Swiss communes. The Swiss Government demanded reparation from the Italian Government for the damage sustained; it invoked the principle of good

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35/ Whiteman, op. cit., vol. 4, p. 567.

36/ International Herald Tribune, 15 June 1982, p. 5, col. 2.

neighbourliness and argued that Italy was liable since it tolerated the existence of an explosives factory, with all its attendant hazards, in the immediate vicinity of an international border. 37/

(22) In 1971, the Liberian tanker Juliana ran aground and split apart off Niiagata, on the west coast of the Japanese island of Honshu. The oil of the tanker washed ashore and extensively damaged local fisheries. The Liberian Government (the flag State) offered 200 million yen to the fishermen for damage, which they accepted. 38/ In this affair, the Liberian Government accepted the claims for damage caused by the act of a private person. It seems that no allegations of wrongdoing on the part of Liberia were made at an official diplomatic level.

(23) Following the accidental spill of 12,000 gallons of crude oil into the sea at Cherry Point, in the State of Washington, and the resultant pollution of Canadian beaches, the Canadian Government addressed a note to the United States Department of State in which it expressed its grave concern about this "ominous incident" and noted that "the Government wishes to obtain firm assurances that full compensation for all damages, as well as the cost of clean-up operations, will be paid by those legally responsible". 39/ Reviewing the legal implications of the incident before the Canadian Parliament, the Canadian Secretary of State for External Affairs stated:

> "We are especially concerned to ensure observance of the principle established in the 1938 Trail Smelter arbitration between Canada and the United States. This has established that one country may not permit the use of its territory in such a manner as to cause injury to the territory of another and shall be responsible to pay compensation for any injury so suffered. Canada accepted this responsibility in the Trail Smelter case and we would expect that the same principle would be implemented in the present

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37/ Guggenheim, loc. cit., p. 169.

38/ The Times, London, 1 October 1974; Revue générale de droit international public, Paris, vol. 80, 1975, p. 842.

39/ Loc. cit.

situation. Indeed, this principle has already received acceptance by a considerable number of States and hopefully it will be adopted at the Stockholm Conference as a fundamental rule of international environmental law." 40/

(24) Canada, referring to the precedent of the Trail Smelter case, claimed that the United States was responsible for the extraterritorial damage caused by acts occurring under its territorial control, regardless of whether the United States was at fault. The final resolution of the dispute did not involve the legal principle invoked by Canada; the private company responsible for the pollution offered to pay the costs of the clean-up operations.

(25) In 1973, a major contamination occurred in the Swiss canton of Bâle-Ville owing to the production of insecticides by a French chemical factory across the border. The contamination caused damage to the agriculture and environment of that canton and destroyed some 10,000 litres of milk production per month. 41/ The facts about the case and the diplomatic negotiations that followed are difficult to ascertain. The Swiss Government apparently intervened and negotiated with the French authorities in order to halt the pollution and obtain compensation for the damage. The reaction of the French authorities is unclear; it appears, however, that persons injured brought charges in French courts.

(26) During negotiations between the United States and Canada regarding a plan for oil prospecting in the Beaufort Sea, near the Alaskan border, the Canadian Government undertook to guarantee payment of any damage that might be caused in the United States by the activities of the private corporation that was to undertake the prospecting. Although the private corporation was to furnish a bond covering compensation for potential victims in the United States, the Canadian Government accepted liability on a subsidiary basis for payment of the cost of transfrontier damage should the bonding arrangement prove inadequate.

(27) In connection with the construction of a highway in Mexico, in proximity to the United States border, the United States Government, considering that, notwithstanding the technical changes that had been made in the project at its

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40/ Ibid., p. 334.

41/ See Annuaire suisse de droit international, 1974, Zurich, vol. 30, p. 147.

request, the highway did not offer sufficient guarantees for the security of property situated in United States territory, reserved its rights in the event of damage resulting from the construction of the highway. In a note addressed on 29 July 1959 to the Mexican Minister of Foreign Relations, the United States Ambassador to Mexico concluded:

> "In view of the foregoing, I am instructed to reserve all the rights that the United States may have under international law in the event that damage in the United States results from the construction of the highway." 42/

(28) In the case of the Rose Street Canal, both the United States and Mexico reserved the right to invoke the accountability of the State whose construction activities might cause damage in the territory of the other State.

(29) In the correspondence between Canada and the United States regarding the United States Cannikin underground nuclear tests on Amchitka, Canada reserved its rights to compensation in the event of damage.

(30) After the preceding examination of international practice, the Commission notes that treaty practice shows a clear tendency in imposing no-fault (*sine delicto*) liability for extraterritorial harm on the operators of activities or their insurers. 43/ This is standard practice in treaties

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42/ Whiteman, op. cit., vol. 6, p. 262.

43/ See for example, in area of oil pollution, the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969, (UNTS, vol. 973, p. 3); the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 18 December 1971 (ibid,. vol. 1110, p. 57); The Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources of 17 December 1976 (UNEP, Selected Multilateral Treaties ..., p. 474); the Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, of 1 December 1984 (IMO, LEG/CONF.6/66) - in the area of nuclear energy and material, the Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 (UNTS, vol. 956, p. 251); the Convention Supplementary to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy (UNEP, Selected Multilateral Treaties ..., p.171); the Convention on the Liability of Operators of Nuclear Ships of 1962 (AJIL, vol. 57, p. 268); the Vienna Convention on Civil Liability for Nuclear Damage, of 21 May 1963 (UNTS, vol. 1063, p. 265); the Convention relating to Civil Liability in the Field of Maritime of Carriage of Nuclear Material of 17 December 1971 (ibid., vol. 974, p. 255) - in the area of other activities, the Convention on the International Liability for Damage Caused by Space Objects of 29 March 1972 (UNTS, vol. 610, p. 205) and the Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment of 9 March 1993.

primarily concerned with commercial activities. Some conventions, regulating activities undertaken mostly by private operators, impose certain obligations upon the State to ensure that its operators abide by those regulations. If the State fails to do so, it is held liable for the injuries the operator causes either for the whole compensation or that portion of it not satisfied by the operator. 44/

(31) On the other hand, the Convention on International Liability for Damage Caused by Space Objects of 1972 45/ holds the launching State absolutely liable for transboundary damage. This Convention is rather unique because, at the time of its conclusion, it was anticipated that the activities being regulated, because of their nature, would be conducted only by States. The Convention is further unique in that it allows the injured party the choice as to whether to pursue a claim for compensation through domestic courts or to make a direct claim against the State through diplomatic channels.

(32) The Commission finds it striking that the trend of requiring compensation is pragmatic rather than theoretically grounded in a consistent theory of liability. Liability of private operators, their insurers, and possibly States takes many forms in special circumstances. In the view of the Commission, international practice justifies further work on liability by the Commission in respect of significant transboundary harm of activities referred to in article 1.

Article D [7]

Cooperation

States concerned shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing or minimizing the risk of significant transboundary harm and, if such harm has occurred, in minimizing its effects both in affected States and in States of origin.

44/ See for example article III of the 1962 Convention on the Liability of Operators of Nuclear Ships, op. cit. and article 8 of the Convention on the Regulation of Antarctic Mineral Resource Activities, Int'l L. Mat., vol. 28, p. 868.

45/ Op. cit.

Commentary

(1) In the view of the Commission, cooperation between States is essential in designing and implementing effective policies to prevent or minimize the risk of causing significant transboundary harm. The requirement of cooperation of States extends to all phases of planning and of implementation. Principle 24 of the Stockholm Declaration and Principle 7 of the Rio Declaration recognize cooperation as an essential element in any effective planning for the protection of the environment. More specific forms of cooperation have been stipulated in articles that are already adopted on prevention, in particular article 15 "Notification and information", article 16 "Exchange of information", article 16 bis "Information to the public", article 17 "National security and industrial secrets", article 18 "Consultations on preventive measures" and article 19 "Rights of the State likely to be affected". They envisage the participation of the affected State, which is indispensable to enhance the effectiveness of any preventive action. The affected State may know better than anybody else which features of the activity in question may be more damaging to it, or which zones of its territory close to the border may be more affected by the transboundary effects of the activity, such as a specially vulnerable ecosystem, etc.

(2) The article requires States concerned to cooperate in good faith. Paragraph 2 of Article 2 of the Charter of the United Nations provides that all Members "shall fulfil in good faith the obligations assumed by them in accordance with the present Charter." The Vienna Convention on the Law of Treaties and the Convention on Succession of States in Respect of Treaties declare in their preambles that the principle of good faith is universally recognized. In addition article 26 and paragraph 1 of article 31 of the Vienna Convention on the Law of Treaties acknowledge the essential place of this principle in the structure of treaties. The decision of the International Court of Justice in the Nuclear Tests case touches upon the scope of the application of good faith. In that case, the Court proclaimed that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith." 46/ This dictum of the Court implies that good faith applies also

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46/ I.C.J., Reports, 1974, p. 268.

to unilateral acts. 47/ Indeed the principle of good faith covers "the entire structure of international relations". 48/

(3) The arbitration tribunal established in 1985 between Canada and France on disputes concerning filtering with the Gulf of St. Lawrence La Bretagne, held that the principle of good faith was among the elements that afforded a sufficient guarantee against any risk of a party exercising its rights abusively. 49/ In the Rainbow Warrior arbitration, the Tribunal in determining whether the French conduct was justified, used the criterion of whether France had made "a good faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement". 50/

(4) The words "States concerned", in the article, refer to the State of origin and the affected State or States. While other States in a position to contribute to the goals of these articles are encouraged to cooperate, they have no legal obligation to do so.

(5) The article provides that States shall as necessary seek the assistance of any international organization in performing their preventive obligations as set out in these articles. States shall do so only when it is deemed necessary. The words as necessary are intended to take account of a number of possibilities, including the following:

(6) First, assistance from international organizations may not be appropriate or necessary in every case involving the prevention or minimization of transboundary harm. For example, the State of origin or the affected State may, themselves, be technologically advanced and have as much or even more technical capability than international organizations to prevent or minimize significant transboundary harm. Obviously, in such cases, there is no obligation to seek assistance from international organizations.

(7) Second, the term "international organizations" is intended to refer to organizations that are relevant and in a position to assist in such matters.

47/ See M. Virally, review Essay of E. Zoller, La Bonne Foi en Droit International Public, 1977, in Am. J. Int'l L., vol. 77, p. 130.

48/ See R. Rosenstock, "The Declaration of Principles of International Law Concerning friendly Relations: A Survey", Am. J. Int'l L. vol. 65, p. 734.

49/ International Law Reports, vol. 82, p. 614.

50/ Ibid., p. 555.

Even with the increasing number of international organizations, it cannot be assumed that there will necessarily be an international organization with the capabilities necessary for a particular instance.

(8) Third, even if there are relevant international organizations, their constitutions may bar them from responding to such requests from States. For example, some organizations may be required (or permitted) to respond to requests for assistance only from their member States, or they may labour under other constitutional impediments. Obviously, the article does not purport to create any obligation for international organizations to respond to requests for assistance under this article.

(9) Fourth, requests for assistance from international organizations may be made by one or more States concerned. The principle of cooperation means that it is preferable that such requests be made by all States concerned. The fact, however, that all States concerned do not seek necessary assistance does not discharge the obligation of individual States to seek assistance. Of course, the response and type of involvement of an international organization in cases in which the request has been lodged by only one State will depend on the nature of the request, the type of assistance involved, the place where the international organization would have to perform such assistance, etc.

(10) The latter part of the article speaks of minimizing the effects "both in affected States and in States of origin". It anticipates situations in which, due to an accident, there is, in addition to significant transboundary harm, massive harm in the State of origin itself. These words are, therefore, intended to present the idea that, in many ways, significant harm is likely to be a nuisance for all the States concerned, harming the State of origin as well as the other affected States. Hence, transboundary harm should, to the extent possible, be looked at as a problem requiring common endeavours and mutual cooperation to minimize its negative consequences. These words, of course, do not intend to impose any financial costs on the affected State for minimizing harm or clean-up operation in the State or origin.

(11) The expression "affected State" means the State in the territory or otherwise under the jurisdiction or control of which the significant transboundary harm has occurred. This expression will eventually be moved to article 2 "Use of terms".